IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 19, 2006

STATE OF TENNESSEE v. KEVIN B. ARMSTRONG

Direct Appeal from the Criminal Court for Davidson County
No. 2004-B-1270 Cheryl Blackburn, Judge

No. M2005-02781-CCA-R3-CD - Filed August 8, 2006

The defendant, Kevin B. Armstrong, appeals the trial court's revocation of his community corrections sentence. The sole issue on appeal is whether the trial court abused its discretion in ordering the defendant to serve the balance of his sentence in confinement. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, J., and J.S. DANIEL, SR. J., joined.

Emma Rae Tennent, Assistant Public Defender (on appeal), and Dawn Deaner, Assistant Public Defender (at trial), for the appellant, Kevin B. Armstrong.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Angelita Dalton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On September 2, 2004, the defendant pled guilty to possession of .5 or more grams of cocaine with intent to sell, a Class B felony, and was sentenced as a Range I, standard offender to ten years in the Department of Correction. Pursuant to the plea agreement, the defendant's sentence was suspended and he was placed into a community corrections program. Subsequently, on December 17, 2004, a community corrections violation warrant was issued as a result of the defendant's testing positive for cocaine and marijuana on November 30, 2004. The defendant conceded the violation, and the trial court reinstated his community corrections sentence with the additional requirement that he complete a drug treatment program. Thereafter, on May 13, 2005, a second violation warrant was issued alleging that the defendant had violated his curfew, been arrested for driving on a suspended

license, and failed to report his arrest to his case officer. The defendant again conceded the violation, and the trial court placed him back on community corrections. A third violation warrant was issued on June 3, 2005, as a result of the defendant's testing positive for cocaine and his admission that he drove to court and to the community corrections office on June 1, 2005, while his driver's license was suspended. Seven days after the third violation warrant was issued, a fourth violation warrant was issued alleging that the defendant had been charged in general sessions court with possession of a controlled substance. The trial court again reinstated the defendant to community corrections but increased his sentence to eleven years and ordered that he complete intensive outpatient drug treatment. On August 19, 2005, a fifth violation warrant was issued as a result of the defendant's positive drug screen on August 5, 2005, and a revocation hearing was held on September 16, 2005.

At the revocation hearing, Ron Miller, a community corrections case developer, testified that he monitored the defendant's drug screen on August 5, 2005, at the request of the defendant's case officer, Everett Morgan, who had to be in court. He explained that the procedure followed when administering a drug test was to fill out a chain of custody form, obtain the specimen in a cup and secure it with a security seal, place the cup in a plastic bag which also contains a security seal, note the time and place of the specimen, and put the specimen in the secured area in the lab. He said he gave the defendant a sealed specimen cup and observed him provide a specimen and secure the top of the cup with a security tag. He said that Morgan had given him the kit and the paperwork for the defendant's drug test. Miller explained that Morgan filled out the top of the form, but he wrote in Morgan's name and the dates.[1] Asked if he or Morgan had checked the "reasonable suspicion" box on the form, Miller replied, "If I had to guess, I'd say I did."

John Holley of the Davidson County Community Corrections Program Drug Testing Unit testified that samples submitted to him for testing are in a sterile specimen bottle with an integrity seal over the top and contain the identifying information and the date the sample was collected. Samples are then packaged in sealed bags which also contain the chain of custody paperwork. He said that the seal on the sample submitted by the defendant was intact when he received it for testing and that the test showed a positive result for cocaine. Holley said that specimens submitted for testing never leave the lab.

Everett Morgan, the defendant's community corrections case officer, testified that he requested the drug screen on the defendant because he did not show up for his August 1, 2005, report date until August 5. Because he had to be in court that day, Morgan asked Miller to meet with the defendant and administer a drug screen. He told Miller that he suspected the defendant might be using drugs because of his sporadic reporting. He denied that he gave Miller the kit used to perform the defendant's drug screen or that he completed the paperwork. Morgan said that he spoke to a counselor at the drug court, who informed him that the defendant had attended the treatment program on the evening of August 4, 2005, and acknowledged that the defendant had been in the program for

[1] Part I of the form lists information about the donor such as name, race, date of birth, and identification number, as well as the name of the case officer and the reason for the test. Part IV of the form is the chain of custody section which lists the dates and times of transfer of the specimen.

"probably a little over a month" when he tested positive for cocaine on August 5. He also acknowledged that the defendant had maintained employment and performed his public service work. Morgan said the defendant admitted that he had a drug problem but denied he had used cocaine.

At the conclusion of the hearing, the trial court revoked the defendant's community corrections sentence and ordered him to serve the balance of his eleven-year sentence in the Department of Correction.

ANALYSIS

The defendant argues that the trial court erred in revoking his community corrections sentence and placing his eleven-year sentence into effect, saying that he "strenuously disputes the validity of the August 5 drug screen and argues that the record contains substantial inconsistencies regarding the testing procedure to which he was subjected." He also argues that the trial court abused its discretion by placing his entire sentence into effect based, in part, on his prior record.

The primary purpose of the Community Corrections Act of 1985 is to "[e]stablish a policy within the state to punish selected, nonviolent felony offenders in front-end community based alternatives to incarceration, thereby reserving secure confinement facilities for violent felony offenders[.]" Tenn. Code Ann. § 40-36-103(1) (2003). The program offers a flexible alternative beneficial to both the defendant and society. State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990).

Once the defendant violates the terms of his community corrections sentence, the trial court may revoke the sentence and impose a new one. Tennessee Code Annotated section 40-36-106(e)(4) grants the trial court the authority to resentence a defendant following the revocation of the original sentence. The court "may resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed, less any time actually served in any community-based alternative to incarceration." Tenn. Code Ann. § 40-36-106(e)(4).

Revocation of a community corrections sentence may occur upon finding by a preponderance of the evidence that the defendant has violated the conditions of the agreement. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). "The judgment of a trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion." Id. For a reviewing court to find an abuse of discretion, it must be shown that the record contains no substantial evidence to support the trial judge's conclusion. Id.

In revoking the defendant's community corrections sentence, the trial court determined:

> Mr. Miller, though foggy on some details, was pretty clear that . . . I think the only discrepancies I heard was that whether or not Mr. Morgan actually handed him the kit or he got the kit. But the kits are sealed. He hands him the cup. The defendant,

himself, actually unscrews it and breaks the seal and seals it and then it's put into a bag. So there is no question that this specimen has not been contaminated. And what we know from Mr. Holley's testimony is that he's not going to test it if it's – everything is secure, the machine is working properly. And the defendant even says, he smokes weed, but, you know, that's really – even though it's not positive for that. So he's violated the program.

So what do we do with him. I'm looking back at his record and it's kind of hard to – it looks like there's an eight year sentence somewhere along the line, where there's been a probation violation. . . . It looks like '98.

. . . .

There's another two year sentence for evading arrest. There's a three [year] sentence for possession of cocaine. . . .

. . . .

. . . So this is not [the defendant's] first time through. And I'm well aware of the fact that drugs are hard to kind of get off. But at the same time, we have to make some efforts. . . . I guess it started in 1994, an eight year sentence. There were several other things. He was reinstated. All right. Mr. Armstrong, it would appear that you do not understand. So this is what I'm going to do, I'm going to put the sentence into effect. . . .

The record readily supports the decision of the trial court to revoke the defendant's community corrections sentence and order that he serve the balance of his sentence in confinement. Prior to the revocation, the defendant had violated the conditions of his community corrections sentence four times, with the trial court reinstating him to community corrections each time. Proof at the revocation hearing established that the defendant tested positive for cocaine on August 5, 2005. Although the defendant disputes the validity of his drug screen, arguing that the testimony of Miller and Morgan was contradictory, we cannot conclude that such was the case. While it is unclear from Miller and Morgan's testimony whether Morgan gave the defendant's drug test kit to Miller or Miller got it himself, Miller testified that the specimen cup was sealed when he gave it to the defendant and that the defendant placed a security tag on the cup after giving his specimen. Holley testified that the seal on the cup was intact when he received it for testing. Accordingly, we agree with the trial court's determination that the specimen was not contaminated. The defendant also argues that the trial court abused its discretion by placing his entire sentence into effect based partly on his prior record. Our view of the ruling is that, while the trial court noted the defendant's prior record, he was incarcerated because of his refusal to abide by the rules of community corrections.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgment of the trial court revoking the defendant's community corrections sentence and ordering that he serve the balance of the sentence in confinement.

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ALAN E. GLENN, JUDGE